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f. Pa -> sales to minors (Dauphin Cty)

M E M O R A N D U M

March __, 1993

RE: PENNSYLVANIA SALES OF CIGARETTES TO MINORS

This memorandum responds to the February 18, 1993 letter from Richard A. Lewis, District Attorney for Dauphin County, Pennsylvania, to Ernest D. Preate, Jr., Attorney General of Pennsylvania, in which Mr. Lewis requests that the Attorney General issue a formal opinion addressing the minimum sales age for cigarettes in Pennsylvania. Mr. Lewis suggests that Pennsylvania law prohibits the sale of cigarettes to persons under the age of 21. He notes that Section 6306 of the Crimes Code, 18 Pa. C.S. § 6306, prohibits the sale of cigarettes to "any minor," and that the Statutory Construction Act, 1 Pa. C.S. § 1991, defines a "minor" as "an individual under the age of 21 years."

In fact, the minimum sales age for cigarettes has been 18 since 1990, when Section 6305 of the Crimes Code, 18 Pa. C.S. § 6305, was amended to raise the minimum sales age for "tobacco, in any form," from 16 to 18. The minimum sales age for cigarettes, as for other tobacco products, previously was 16, as specified in Section 6305 prior to the 1990 amendment.

The District Attorney's reliance on the Statutory Construction Act is misplaced. That Act itself provides that the definitions contained in Section 1991 apply only when the context does not "clearly indicate[ ] otherwise." 1 Pa. C.S. § 1991; see

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2458-93-29650

Habecker v. Nationwide Insurance Co., 299 Pa. Super. 463, 472, 445 A.2d 1222, 1227 (1982); Fox Chapel Area School District v. Dunlap, 53 Pa. Commw. 479, 481, 417 A.2d 1329, 1330 (1980). As demonstrated below, Sections 6305 and 6306 are viewed as co-extensive by the courts, the U.S. Secretary of Health and Human Services, the General Assembly, the public at large, and the government officials charged with enforcing them. These entities cannot all be mistaken. Section 6305 establishes the minimum sales age for cigarettes, and that age is 18.

I. THE LANGUAGE OF SECTIONS 6305 AND 6306 PRECLUDES THE SUGGESTED ANALYSIS.

With respect to the sale of tobacco products, the Crimes Code provides as follows:

> § 6305. Sale of tobacco
>
> (a) Offense defined.--A person is guilty of a summary offense if he:
>
> (1) sells tobacco, in any form, to any minor under the age of 18 years;
>
> (2) by purchase, gift or other means, furnishes tobacco, in any form, to a minor under the age of 18 years; or
>
> (3) knowingly and falsely represents himself to be 18 years of age or older to another for the purpose of procuring or having furnished to him tobacco in any form.
>
> (b) Penalty.--A person who violates this section shall, upon conviction, be sentenced to pay a fine of not less than $25 for a first offense and not less than $100 for a subsequent offense.

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§ 6306. Furnishing cigarettes or cigarette papers

(a) Offense defined.--A person commits an offense if he furnishes to any minor, by gift, sale or otherwise, any cigarettes or cigarette paper.

(b) Grading.--Whoever commits an offense under this section shall, upon being convicted thereof in a summary proceeding, be sentenced for the first offense to pay a fine not exceeding $25 and for the second offense shall be fined not exceeding $100; and for the third or subsequent offense shall be guilty of a misdemeanor of the third degree.

The only reported case that has construed these two sections treated them as substantively identical. In Commonwealth v. Goodyear, 67 D. & C. 2d 521 (C.C.P. Del. 1974), aff'd in relevant part, 235 Pa. Super. 544, 344 A.2d 672 (1975), the Court of Common Pleas of Delaware County interpreted the predecessors of Sections 6305 and 6306 as follows:

> It is a crime to furnish tobacco to a minor: Act of June 24, 1939, P.L. 872, sec. 647, 18 PS §4647. It is a crime to furnish cigarettes or cigarette paper to a minor: Act of June 24, 1939, P.L. 872, sec. 648, 18 PS §4648. We must conclude that anyone furnishing tobacco, cigarettes or cigarette paper to a minor could be found guilty of corrupting the morals of a minor.

67 D. & C. 2d at 524. In affirming the trial court's decision on this point, the Superior Court reiterated that court's interpretation that the predecessors of Section 6305 and 6306 "make it a crime to furnish tobacco to minors, and to furnish cigarettes or cigarette paper to minors." 235 Pa. Super. at 548 n.4, 344 A.2d at 674 n.4. Thus, under Goodyear, the term "minor"

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as used in Section 6306 must be construed to mean "under the age of 18 years" as used in Section 6305.

The U.S. Secretary of Health and Human Services similarly views Section 6305 and 6306 as co-extensive and as prescribing the same minimum sales age for cigarettes and other tobacco products. Summarizing the laws of the 50 states governing "Regulation of Sale to and Use of Tobacco Products by Minors," the Secretary's entry for Pennsylvania in his 1990 report to Congress stated as follows:

> It is a summary offense to furnish cigarettes, cigarette papers, or tobacco in any form to one under 16 years of age. Violation of this section is punishable by a fine up to $25 for the first offense and up to $100 for the second offense. Subsequent offenses constitute a third degree misdemeanor. Reference Date 1972. PA. STAT. ANN. Title 18, Sections 6305 & 6306 (Purdon 1983).

A Report to Congress: Smoking and Health -- A National Status Report (2nd Ed.), p. 107 (Feb. 1990).[1]

To interpret Sections 6305 and 6306 as other than coextensive would produce an illogical result. Only Section 6305 prohibits a person from falsely representing his or her age to obtain tobacco products. That prohibition relates only to a

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1. The Secretary continued to view Sections 6305 and 6306 as co-extensive even after the forms was amended in 1990 to raise the minimum sales age to 18. Allentown health officials for their "sting" operations and for "mailing posters to cigarette retailers reminding buyers that they must be 18 or older." "Health Officials Back Cigarette Machine Bill," Allentown Morning Call, June 8, 1990, p. B-6.

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person under the age of 18. 18 Pa. C.S. § 6305(a)(3). If the minimum sales age for cigarettes were 21, the result would be that persons under 18 could not misrepresent their age to obtain cigarettes but persons over 18 and under 21 could. It is a cardinal rule of statutory construction that such an illogical result should be avoided. See Commonwealth v. Lurie, 524 Pa. 56, 63, 569 A.2d 329, 332 (1990); Consulting Engineers Council v. State Architects Licensure Board, 522 Pa. 204, 212, 560 A.2d 1375, 1379 (1989); 1 Pa. C.S. § 1922(1).

II. THE LEGISLATIVE HISTORY AND THE PUBLIC RECORD PRECLUDE THE SUGGESTED ANALYSIS.

The conclusion dictated by the language of Sections 6305 and 6306 is confirmed by the legislative history of those sections and related statutory provisions. In considering this broader context, it is clear that both the General Assembly and the public have long understood that the minimum sales age for cigarettes is the age specified in Section 6305, i.e., that Sections 6305 and 6306 are intended to be read together.

A. Legislative History

Before 1990, Section 6305 had prohibited the sale of "tobacco, in any form," to any person under the age of 16. In 1990, Section 6305 was amended to raise the minimum sales age to 18. See P.L. 54, No. 7, § 2, Feb. 14, 1990. The minimum sales age was raised from 16 to 18 in order to facilitate enforcement of the prohibition against smoking on school property codified at

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35 P.S. § 1223.5. As Representative Saurman, the sponsor of the amendment, explained, this prohibition was thought to be undermined by a minimum cigarette sales age of 16:

> Mr. Speaker, this amendment is one that we passed last session toward the end of the session, and unfortunately it was not acted on by the Senate. What it does is increase the legal age to purchase tobacco from the current 16 years of age to 18 years. Particularly, I think this is important since we have forbidden smoking on school property, and this will make that easier to enforce.

1989 Legislative Journal -- House, p. 605 (emphasis added). The administrator of the Health Department's Smoking and Health Program similarly justified the increase in the minimum sales age. Repeating the views expressed by Representative Saurman, Ms. Vickie Newlin asserted that the new law would "complement existing prohibitions against smoking on school buses and school property." "New State Law Raises Minimum Age to Obtain Tobacco," PR Newswire, Mar. 13, 1990.

Senator Dawida, who had sponsored a prior version of the same amendment in the Senate, also understood Section 6305 to set the minimum sales age for cigarettes. In explaining his amendment, he stated that it "basically deals with raising the age and clarifying the language allowing smoking, from age 16 to 18." 1989 Legislative Journal -- Senate, p. 1518.

The amendment to Section 6305 obviously would have been unnecessary to achieve its stated purpose if the General Assembly

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had understood Section 6306 to prescribe 21 as the minimum sales age for cigarettes. The sponsors of this legislation, and the General Assembly that enacted it, clearly regarded Section 6305 as establishing the applicable minimum sales age for cigarettes, and that is why they undertook to amend it.

Moreover, it was this 1990 amendment that prohibited persons under the age of 18 from falsely representing their age for the purpose of procuring tobacco products. (See supra at 4-5) If the legislators had believed that Section 6306 contained a different age limitation than Section 6305, they surely would have added a similar proscription to Section 6306 as well.

The contemporaneous statements of the sponsoring legislators of these provisions, and the related history, are entitled to considerable weight. See South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 88-89, 555 A.2d 793, 796-97 (1989); Commonwealth v. Edwards, 384 Pa. Super. 454, 461, 559 A.2d 63, 66, appeal denied, 523 Pa. 640, 565 A.2d 1165 (1989); In the Interest of RMR, 366 Pa. Super. 243, 255-56, 530 A.2d 1381, 1387 (1987); see also Commonwealth v. DePasquale, 509 Pa. 183, 190-91, 501 A.2d 626, 630-31 (1985); Donegal Mutual Insurance Co. v. Long, 387 Pa. Super. 574 & n.3, 564 A.2d 937, 942 & n.3 (1989), aff'd, 528 Pa. 295, 597 A.2d 1124 (1991); Commonwealth v. Levy, 197 Pa. Super. 297, 178 A.2d 858, 860 (1962); see generally Pennsylvania Human Rights Comm'n v. Chester School District, 427 Pa. 157, 166-67, 233 A.2d 290,

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295-97 (1969); Rossiter v. Whitpain, 404 Pa. 201, 203-04, 170 A.2d 586, 587 (1961). This history establishes that the General Assembly intended that the defined age in Section 6305 -- not some "incorporated" definition from a different statute -- determine the minimum sales age for cigarettes.

Further, the comments of the sponsors of the 1990 legislation were presaged by those of the sponsors of the 1988 legislation banning smoking on public school grounds. See 35 P.S. § 1223.5(a), (e). In 1988 the General Assembly amended the Fire and Panic Act to prohibit cigarette smoking and other uses of tobacco in school buildings and on school buses. P.L. 1315, No. 168, § 2, Dec. 21, 1988. During the course of the debate on that amendment, the legislators explicitly stated their understanding that Pennsylvania law permitted cigarette sales to those under 21. Representative Sirianni and Representative Reber, the sponsor of the legislation, engaged in the following colloquy:

> Miss SIRIANNI: Mr. Speaker, does this [proscription on smoking on school grounds] include teachers?
>
> Mr. REBER: Mr. Speaker, I would simply respond to the question of the gentle lady, Miss Sirianni, that in the Commonwealth of Pennsylvania, assuming that we are talking about teachers being adults -- and I think from the certification process, they must reach that emancipation age to appropriately receive the appropriate degree to in fact be certified as a teacher -- they are not prohibited from the purchasing of cigarettes, which is currently the law in Pennsylvania as it might relate to a student. I think it

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2458-93-29650

> would be a very serious infringement upon the rights of people that are otherwise permitted the legal authority to purchase and possess these particular items to attempt to otherwise regulate them and prohibit them. So obviously I would not attempt to discriminate against a class such as teachers, which is legitimately authorized to do certain things in this area.
>
> The SPEAKER: Miss Sirianni, he means no.
>
> Miss SIRIANNI: Mr. Speaker, we have 18-year-olds in school, too, and that is legal for them. Is it not discriminatory to let the teachers smoke and not the 18-year-old students?
>
> Mr. REBER: Mr. Speaker, for brevity's sake, I will simply rely upon my earlier response.
>
> The SPEAKER: Again the answer is no.

1987 Legislative Journal -- House, p. 1985 (emphasis added).

These legislators, like those who raised the minimum sales age from 16 to 18 in 1990, clearly understood that Pennsylvania law allows persons 18 years and older to smoke. This legislative history, like the decisions in Goodyear, establish that Sections 6305 and 6306 are to be viewed as coextensive.[2]

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2. Sections 6305 and 6306 date back to before the turn of the century. In 1889, the General Assembly enacted the ancestor of Section 6306 -- a law prohibiting the sale of cigarettes to any person or persons under the age of sixteen years." P.L. 105, No. 111, May 7, 1889. In 1901, the General Assembly enacted the ancestor of Section 6305 -- a law generally prohibiting the sale of "tobacco, in any form, to a person under the age of sixteen years." P.L. 638, No. 323, §§ 1, 2, July 10, 1901. In 1903, the General Assembly replaced the cigarette provision with one prohibiting the sale of cigarettes to "any person, or persons, under the age of twenty-one years." P.L. 154, No. 110, Apr. 4, 1903. This provision was repealed in 1913

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B. **Public Record**

When the General Assembly amended Section 6305 in 1990 by raising the minimum sales age to 18, the general public fully understood that the change applied to the sale of cigarettes as well as other tobacco products. See, e.g., "House Raises Penalties for Attacking Sports Officials," United Press International, Feb. 13, 1990 (the then-pending legislation "would prohibit the sale of cigarettes and other tobacco products [except] to those 18 or older. Currently, the legal age limit is 16."); "City Sends Smoke Signals to Cigarette Vendors," Allentown Morning Call, Mar. 29, 1990, p. B-3 (new cigarette vendor signs to "reflect an increase from 16 to 18 in the legal age at which someone can buy tobacco products"); "Nazareth Misses Health Message," Allentown Morning Call, Mar. 28, 1990, p. A-18 ("A new state law raises the age, from 16 to 18, at which young people legally may buy cigarettes").

2.(...continued)
and replaced with a statute prohibiting the furnishing of cigarettes or cigarette paper to "any minor." P.L. 198, No. 137, §§ 1, 3, May 9, 1913 (18 P.S. § 1174). In 1939, the tobacco and cigarette provisions were codified as Sections 647 and 648 of the Pennsylvania Penal Code. P.L. 872, No. 375, §§ 647, 648, June 24, 1939 (18 P.S. §§ 4647, 4648). The 1939 codification remained in force until the 1972 codification of the Pennsylvania Crimes Code, when Sections 647 and 648 were replaced with Sections 6305 and 6306. P.L. 1482, No. 334, § 1, Dec. 6, 1972. The 1972 recodification eliminated another provision dating to 1913 requiring minors upon request to divulge where and from whom they had obtained cigarettes or cigarette papers.

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Since the 1990 amendment, the press uniformly has reported that state law prohibits the sale of cigarettes only to those under 18 years of age. See, e.g., "Cigarette-Sale Limits Vetoed in Pittsburgh," Philadelphia Inquirer, Aug. 4, 1990, p. B-3 ("state law already bans the sale of cigarettes to those under 18 years of age"); "Cigarette Vending Machine Controls Proposed," Pittsburgh Press, July 19, 1990, p. EZ-1 ("state law prohibits children under 18 from buying cigarettes"); "Bethlehem to Propose Licenses and Regulations for Cigarette Machines," Allentown Morning Call, Aug. 11, 1990, p. B-3 ("it is illegal to sell cigarettes to anyone under 18"); "Looking for Smoking's Victims Who Are Willing to Help Others," Allentown Morning Call, July 20, 1990, p. A-19 (cigarettes were purchased by 13-year-olds who were "well below the 18-year-old minimum required by state law"); "Councilmen to Propose Restrictions for Cigarette Vending Machines," Allentown Morning Call, June 5, 1990, p. B-1 ("Under state law, people under 18 are not allowed to buy or possess cigarettes").

In fact, the president of the Association for Non-smokers' Rights of Pa., Inc. has affirmed in an editorial published in the Pittsburgh Press that the minimum sales age for cigarettes is 18. See "Ban Cigarette Machine Sales," Pittsburgh Press, June 1, 1990, p. B-2 ("vending machines are a principal source of cigarettes for youngsters under 18, who by state law are not permitted to purchase them").

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Moreover, according to one recent report, a public survey conducted by the Mansfield University's Rural Services Institute indicated that a majority of rural Pennsylvanians would be willing "to extend [the existing law] even further by making it illegal to smoke unless one is at least 18." "Survey Finds Support for Minimum Smoking Age," United Press International, May 30, 1993.

* * *

Thus, the legislative history and public record demonstrate that the minimum age for the sale of cigarettes is the age specified in Section 6305 -- 18.

III. THE CONSISTENT INTERPRETATION BY THE GOVERNMENT OFFICIALS THAT ENFORCE SECTIONS 6305 AND 6306 AND RELATED PROVISIONS PRECLUDES THE SUGGESTED ANALYSIS.

The various governmental entities charged with enforcing Sections 6305 and 6306 also uniformly have concluded that the sale of cigarettes is governed by the defined age limitation in Section 6305. These interpretations are entitled to substantial respect and consideration. See, e.g., In re Loeb's Estate, 400 Pa. 368, 373, 162 A.2d 207, 211 (1960) ("the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for clear language in the Act itself . . ."); see also Krivosh v. City of Sharon, 205 Pa.

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Super. 498, 501, 211 A.2d 109, 111 (1965) ("if the interpretation placed upon the statute for all these years was not the interpretation intended by the legislature, it would have amended the section . . .").

Among the officials who have acknowledged that the minimum sales age is not 21 are:

a. State Health Department officials, who in publicizing the 1990 change in the minimum sales age described the law as "rais[ing] from 16 to 18 the minimum age at which individuals may legally obtain tobacco products in Pennsylvania" and "urged retailers to require proof of age from tobacco purchasers they suspect to be under age 18." "New State Law Raises Minimum Age Obtain Tobacco," PR Newswire, Mar. 13, 1990. The Health Department has also sponsored conferences on tobacco and health at which speakers consistently have referred to the then-applicable minimum sales age for cigarettes. See, e.g., Proceedings of the Pennsylvania Consensus Conference on Tobacco and Health Priorities, Oct. 1985, pp. 116-17 (Eugene M. Lewit, Ph.D., New Jersey Medical School).

b. Local Health Boards, who have distributed materials and conducted "sting" operations against local business to "remind people that it's illegal in Pennsylvania to sell cigarettes to anyone under the age of 18." "Cigarette Sales Can Be Hazardous, Store Clerks Learn," Allentown Morning Call, Aug. 8, 1990, p. B-3.

c. Local legislators, who have enacted ordinances restricting cigarette sales through vending machines in order to help enforce the state ban on sales to those under 18. See, e.g., "Smoker Vending Tokens O.K.'ed," Pittsburgh Press, Oct. 3, 1990, p. B-8 ("city council yesterday gave its final okay to legislation requiring that cigarette machines in places open to children

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be modified to accept tokens rather than currency . . . the law prohibits sale of tokens to people younger than 18"); "Token Effort on Smoking," Pittsburgh Press, Sept. 28, 1990, p. B-2 ("having to buy the tokens [for cigarette vending machines] first, the argument goes, would be an extra preventative step against the sale of cigarettes to those under 18, which is illegal under state law").

d. Mayors, who have asked merchants to post signs declaring that their businesses "will not sell cigarettes or other tobacco products to persons under 18 years of age." "City Sends Smoke Signals to Cigarette Vendors," Allentown Morning Call, Mar. 29, 1990, p. D-3.

All of these officials are not wrong. Nor is the U.S. Secretary of Health and Human Services. Nor are the sponsors of the relevant provisions. Nor is the general public.

Simply put, it has long been an open, well-known fact that the legal minimum age for the purchase of cigarettes in Pennsylvania is 18, and before 1990 was 16. That fact cannot be changed by "incorporating" into the Crimes Code a definition that the context clearly demonstrates does not belong there.

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